Neutral Citation Number: [2024] EWCA Crim 239

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00148/A4

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 23rd February 2024

B e f o r e:

LORD JUSTICE SINGH

MRS JUSTICE YIP DBE

MRS JUSTICE FOSTER DBE

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v –

NASSIR ANDRE DAVID MIR

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss F Robertson appeared on behalf of the Attorney General

Miss V Fowler-Rouault appeared on behalf of the Offender

J U D G M E N T
(Approved)

Friday 23rd February 2024

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), for leave to refer sentences to this court on the ground that they were unduly lenient. We grant leave.

2. On 13th December 2023, the offender was sentenced to a three year community order with requirements to complete 40 days Rehabilitation Activity and 300 hours of unpaid work.

3. On two earlier occasions he had pleaded guilty to three offences for which he fell to be sentenced: two offences of being concerned in the supply of Class A drugs, and one of breaching a Criminal Behaviour Order. The procedural history is complicated and we shall need to return to it later in this judgment.

4. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised, for example, in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10 at [72], in a judgment given by the Chancellor of the High Court, as follows:

> "1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
>
> 2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
>
> 3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

> 4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'.
>
> …."

5. In giving the judgment of this court in the seminal case of *Attorney General's Reference No 4 of 1989* (1990) 90 Cr App R 366, at 371, Lord Lane CJ said that its role is not simply to retake the sentencing decision as if this court were the sentencing court. He said that mercy is a virtue and does not necessarily mean that a sentence is unduly lenient. He also emphasised that even where this court considers that a sentence was unduly lenient, it still has a discretion as to whether to exercise its powers. An example of such a case is provided by *Attorney General's Reference No 64 of 2011 (R v Crawford)* [2011] EWCA Crim 2178, of which we have been reminded by Miss Fowler-Rouault, who appears on behalf of the offender before us. In that case this court, having considered that a sentence was unduly lenient, nevertheless exercised its discretion not to quash the sentence because that would "snuff out" a real prospect that the offender's rehabilitation would be complete. It has to be recognised, however, that that was a case of a young man, and this court described the circumstances as being "wholly exceptional" in light of the reports relating to him.

The Facts

6. The facts are not in dispute for present purposes. We take them from the summary set out in the Final Reference on behalf of the Solicitor General.

7. The offender, while on licence for similar offending, was running a drugs line involved in the supply of cocaine and heroin between 1st March 2022 and 7th February 2023. The offending placed him in breach of a Criminal Behaviour Order which prohibited him from having more than one personal mobile phone and having a mobile phone which was not registered in his name or that of his employer.

8. When interviewed under caution on 8th February 2023, the offender answered "No comment" to all questions asked, save to indicate that the jewellery found on him was sentimental, belonging to his deceased grandfather.

9. The circumstances of the offences placed the offender in breach of a ten year Criminal Behaviour Order which had been imposed on 8th January 2021, under which he was prohibited from being in possession of more than one personal mobile phone in a public place and being in possession of a mobile phone or SIM card which was not registered to him or to his employer.

The Procedural History

10. The offender first appeared before Willesden Magistrates' Court on 9th February 2023. He indicated guilty pleas to two offences of being concerned in the supply of a controlled drug of Class A. He gave no indication of plea to two offences of possessing a controlled drug of Class A with intent to supply and possessing criminal property. The matter was sent for trial under section 51 of the Crime and Disorder Act 1988. The offender was remanded in custody on the grounds of the likelihood of the commission of further offences and failing to surrender.

11. It is unnecessary to rehearse the entirety of the procedural history which then ensued, save to note some key dates. On 7th July 2023, the offender was arraigned on counts 3 to 12 on the new indictment and entered not guilty pleas. It is material to note that there was a new count (count 13) on which the defence did not have instructions. The case was adjourned until 18th August 2023 for sentence. At this stage no pre-sentence report was ordered, as immediate custody was noted to be inevitable.

12. The hearing on 18th August was not, in fact, effective. The case was therefore listed on 1st September 2023, when the offender pleaded guilty to count 13, namely breach of the Criminal Behaviour Order. At this stage the Recorder who was considering the case "remitted" the two charges of being concerned in the supply of Class A drugs back to the magistrates' court. In fact, as things turned out, the magistrates' court never again dealt with the case.

13. The case came before His Honour Judge Wright on 13th December 2023. The judge took the view that he could and would exercise his powers under section 66 of the Courts Act 2003 to commit the drugs offences for sentence to the Crown Court, pursuant to section 18 of the Sentencing Act 2020 ("the Sentencing Code").

The Procedural Issues

14. The Registrar drew the parties' attention to two procedural issues which appeared to arise from the history which we have outlined. The first relates to the lawfulness of the Crown Court's "remittal" to the magistrates' court on 1st September 2023. The second relates to the lawfulness of the inclusion of count 13 in the indictment. The Registrar's note prompted the parties to file detailed and helpful written submissions, which have been briefly supplemented at the oral hearing before this court today. We are grateful for those submissions. We did not understand there to be any material difference between counsel as to the ultimate outcome for the application which is before this court under section 36 of the 1988 Act. But their submissions did take, to some extent, fundamentally different positions as to the powers of the Crown Court and the manner in which they were exercised in this case. It is important, therefore, that this court should address the issues.

15. On 9th February 2023, as we have said, the offender pleaded guilty before the magistrates' court to two charges of being concerned in the supply of Class A drugs. The magistrates'

court committed the two offences to which he had pleaded guilty for sentence under section 18 of the Sentencing Code because at that time there were other charges to which no plea had been indicated, which were listed in the Crown Court.

16. The magistrates' court did not, as section 18(4) permits, state their opinion that they would have had the power to commit those matters for sentence under section 14 of the Sentencing Code, which contains the power to commit, where the sentencing powers of the magistrates' court are insufficient. Section 18(1) provides:

> "Where a magistrates' court —
>
> (a) has convicted an offender aged 18 or over of an offence triable either way following an indication of a guilty plea, and
>
> (b) has sent the offender to the Crown Court for trial for one or more related offences,
>
> it may commit the offender … to the Crown Court to be dealt with in respect of the offence in accordance with section 21."

Section 21, as relevant, provides:

> "(1) This section applies where an offender is committed by a magistrates' court for sentence under —
>
> (a) section 14(2) (committal for sentence on summary trial of offence triable either way),
>
> …
>
> (c) section 18(1) (committal for sentence on indication of guilty plea to offence triable either way).
>
> (2) The Crown Court —
>
> (a) must inquire into the circumstances of the case, and

(b) may deal with the offender in any way in which it could deal with the offender if the offender had been convicted of the offence on indictment before the court.

…"

This is expressly made subject to subsections (4) and (5), which we must set out so far as material:

"(4) Subsection (5) applies where a magistrates' court —

(a) commits an offender under section 18(1) to be dealt with in respect of an offence ('the offence'), but

(b) does not make a statement under section 18(4) (statement of power to commit under section 14(2) …).

(5) Unless the offender is convicted before the Crown Court of at least one of the offences for which the magistrates' court has sent the offender for trial … —

(a) subsection (2)(b) does not apply, and

(b) the Crown Court may deal with the offender for the offence in any way in which the magistrates' court could have dealt with the offender for it."

17. Section 25A, so far as material, provides:

"(1) This section applies where a person aged 18 or over … –

(a) has been convicted of an offence by a magistrates' court and committed to the Crown Court for sentence …

(2) The Crown Court may remit the offender to a magistrates' court for sentence.

…"

18. Section 401 of the Sentencing Code provides:

> "In this Code, except where otherwise provided, 'sentence', in relation to an offence, includes any order made by a court when dealing with the offender in respect of the offence, and 'sentencing' is to be construed accordingly."

19. In our judgment, when the Recorder considered the matter on 1st September 2023, he was correct to say that the committal was not invalid, but that the Crown Court's powers of sentencing were limited by section 21(5) to those of the magistrates' court. His Honour Judge Wright was, in our view, correct to say that this did not require remittal to the magistrates' court "for sentence", but we consider that the Recorder was also entitled to exercise his power under section 25A(2) to remit the matter to the magistrates' court. In fact, as we have said, the magistrates' court never considered the case again. So, when the case came before His Honour Judge Wright on 13th December, he had to sit as a magistrate to send it back to the Crown Court, this time making a statement under section 14(1), which provides:

> "This section applies where —
>
> (a) on the summary trial of an offence triable either way a person aged 18 or over is convicted of the offence, and
>
> (b) the court is of the opinion that —
>
> (i) the offence, or
>
> (ii) the combination of the offence and one or more offences associated with it,
>
> was so serious that the Crown Court should have the power to deal with the offender in any way it could deal with the offender if the offender had been convicted on indictment."

20. In our judgment, His Honour Judge Wright was then entitled to use his powers under section 66 of the Courts Act 2003 to sit as a magistrate himself and to send the case back to the Crown Court: see *R v Gould and Others* [2021] EWCA Crim 447; [2021] 2 Cr App R(S) 7.

21. We agree with the submission made on behalf of the Solicitor General that section 401 of the Sentencing Code gives a wide enough meaning to the concept of "sentence" to include consideration of whether the magistrates' court's powers are sufficient, and, having decided that they are not, then to commit the case to the Crown Court for sentence. Once that is done, section 21(2) provides that the Crown Court has the powers of sentence that it would do if there had been a conviction on indictment.

22. The second issue raised in the Registrar's note has become academic in the light of helpful submissions we have received on behalf of both the Solicitor General and the offender. The issue was whether count 13 on the indictment could have been properly added in accordance with section 2(c) of the Administration of Justice (Miscellaneous Provisions) Act 1933. In a nutshell, the Solicitor General's response is: yes, because it flowed from the same material as the offences which were otherwise on that indictment. Although that is not necessarily accepted by counsel for the offender, she fairly acknowledges that she cannot pursue this any further because the offender pleaded guilty to count 13. That plea constitutes a conviction in the Crown Court. There has been no appeal against that conviction. Ultimately, therefore, this has no material bearing on the powers of this court in considering the Solicitor General's application under section 36 of the 1988 Act.

23. Accordingly, we have reached the conclusion that the procedures which were adopted, unusual though they were, had no material impact on the power of the Crown Court to sentence as it would normally do for offences as serious as those in this case. Similarly, they

do not have any material impact on this court's ability to deal with the cases justly, if we reach the conclusion that the sentence passed by the Crown Court was unduly lenient. It is to that question we now turn.

The Sentencing Process

24. The maximum sentence for the drugs offences in this case is life imprisonment: see Schedule 4 to the Misuse of Drugs Act 1971. The maximum sentence for breaching a Criminal Behaviour Order is five years' imprisonment: see section 339(2) of the Sentencing Code.

25. The offender was born on 4th July 1986; he is 37 years old. He has 11 convictions for 24 offences, including possession of drugs, driving offences, handling stolen goods and public order offences. His last conviction was on 11th November 2019, when he was sentenced to a total of 54 months' imprisonment, and a ten year Criminal Behaviour Order was imposed for offences to do with drugs. He was accordingly on licence at the time of the index offences.

26. It is right to note, as has been eloquently emphasised on the offender's behalf by Miss Fowler-Rouault, that the Crown Court had a large body of material before it in support of the offender's mitigation. It included positive behaviour records from prison, references from prison officers and references from prison governors. It is unnecessary for present purposes to set out the details, but we have considered them all. We have also considered the material which has been recently placed before us relating to the offender's progress whilst serving the community sentence which was passed on him.

The Sentencing Remarks

27. In his sentencing remarks, the judge referred to the guideline on drugs offences. He was of the view that the offender's role was "significant". In his view, the offending fell into

category 3, because it was end user dealing. For such offences the definitive guideline recommends a starting point of four and a half years' custody, with a suggested range of three and a half years to seven years. The judge noted that there was the statutory aggravating factor of the offender's previous similar conviction. There were additional aggravating factors: the period of time over which the offences were committed; that there was more than one type of drug; and the breach of the Criminal Behaviour Order. We observe that the judge did not expressly mention the additional aggravating factor that the offender was on licence at the relevant time.

28. There were also powerful mitigating factors. These included delay, which was not the offender's fault, following his guilty pleas particularly before the magistrates' court and that the supply of drugs was, at least for some of the period, because of the offender's own addiction.

29. The judge said that, balancing the aggravating and mitigating factors, the adjusted starting point would be six years' custody. He then turned to the breach of the Criminal Behaviour Order. He said that it was culpability A, because there was a persistent breach, and category 1 harm, because the breach demonstrated a continuing risk of serious criminal behaviour, namely involvement in the supply of drugs again. The starting point in the relevant guideline is two years' custody, with a range of up to four years. The judge said that the sentences would run concurrently. The judge said that there would be full credit for the offender's guilty pleas.

30. The judge then asked the offender to stand up. He said that the appropriate sentence would have been a term of 36 months' imprisonment in respect of each of the drugs charges, and a term of 12 months' imprisonment on count 13. But then the judge said that he would have regard to the Sentencing Council's guideline relating to community and custodial

disposals, which required him to consider the issue of rehabilitation. We would observe that earlier, on page 15 of his sentencing remarks, the judge had already raised the issue of rehabilitation. Be that as it may, the judge observed that he had seen various certificates and references which were "frankly way beyond what one sees in the ordinary course of events in cases such as this, or indeed cases, frankly, of any sort". The judge therefore proposed to take what he acknowledged was an exceptional course. Although the appropriate sentence would otherwise have been a term of 36 months' imprisonment in respect of each of the drugs charges and 12 months' imprisonment on count 13, the judge said that he would impose a three year community order with a Rehabilitation Activity Requirement of 40 days and 300 hours of unpaid work.

31. Of significance, on the following page in his sentencing remarks, the judge stressed that any breaches of that order would be reserved to him, and that if the matter came before him again, it would be those sentences of custody which would be imposed.

The Submissions on behalf of the Solicitor General

32. On behalf of the Solicitor General, it is submitted by Miss Robertson that the judge correctly identified the appropriate sentencing bracket for each of the offences but erred in proceeding to impose a three year community order. Miss Robertson acknowledges that although the sentence of three years' custody which the judge envisaged, having initially started with a figure of six years' custody, was lenient, she would not be entitled to complain that it was unduly so. Nevertheless, Miss Robertson submits that the effect of the judge's approach was to impose an unwarranted sentence of 36 months' imprisonment, suspended for three years, as was reflected by his insistence that any breach would be reserved to him, and that if the offender breached the order or committed any further offences, it would be that sentence of 36 months which would be imposed. She submits that such a sentence is an unlawful circumvention of section 277 of the Sentencing Code, which governs the length of

suspended sentences – an approach which was expressly disapproved by this court in *R v Hartland* [2023] EWCA Crim 790.

33. Miss Robertson submits that the drugs offences in this case passed the custodial threshold by a significant margin, given the facts and the aggravating factors. On the judge's own assessment, the appropriate sentence for each offence, even after mitigation and guilty pleas had been taken into account, was 36 months' imprisonment. That is a sentence which, as a matter of law, is beyond the threshold capable of being suspended because that can be no longer than 24 months' imprisonment.

34. Miss Robertson acknowledges that while the mitigating factors were significant and justified a notable reduction in sentence, she submits that this had already been reflected in the reduction of the sentence from six years' to 36 months' imprisonment, because that amount of reduction cannot be explained only by reference to the credit given for the guilty pleas. She submits that a community order, even with significant punitive elements, did not by some margin reflect the seriousness of this case; this was a case where only an immediate sentence of custody could properly be imposed.

The Submissions on behalf of the Offender

35. On behalf of the offender, Miss Fowler-Rouault submits that the sentence was not unduly lenient. The judge had sight of the numerous references which recorded the offender's change in mindset – two occasions, for example, where he found drugs and reported them to prison staff; and his continuing work in relation to his own addiction, which he has sought to continue in the community. In any event, she submits that if this court concludes that the sentence was unduly lenient, it should nevertheless exercise its discretion and allow the offender to continue to serve his sentence in the community where he is making good progress. It is submitted that the judge did not err in taking into account mitigation twice.

The structure of his sentencing remarks at page 15 is such that, although he had flagged the issue of rehabilitation initially, he only took it into account later. He carefully explained the stages of his reasoning process and how he had arrived at the community order which he imposed.

36. Miss Fowler-Rouault submits that the judge did not unlawfully circumvent section 277 of the Sentencing Code. She invites this court to exercise considerable caution in applying the decision in *Hartland*, which she submits was one very different on its facts; it concerned serious domestic violence.

37. Miss Fowler-Rouault also submits that the Solicitor General's approach would be, in effect, to "guillotine" the exercise conducted by the judge. She submits that the Solicitor General fails to acknowledge the weight that the judge placed on rehabilitation, which was supported by copious and unique material.

38. Finally, Miss Fowler-Rouault submits that the seriousness of the offender's offending did not make a custodial sentence the only appropriate one. She has also drawn this court's attention to the current prison population levels which may have a bearing on whether a sentence can be suspended: see *R v Ali (Arie)* [2023] EWCA Crim 232; [2023] 2 Cr App R(S) 25 at [22].

39. Since this court has been invited to consider the exercise of its discretion not to quash the sentences imposed below, even if it considers that the sentences were unduly lenient, in the light of further material it is only right that we should observe that the pre-appeal report, which this court now has, does not paint a picture which goes only one way. It makes reference to positive features of the offender's conduct and the progress that he is making.

But it also assesses that he poses a high risk of serious harm to members of the general public, known adults and children.

40. In response, Miss Fowler-Rouault submits that the author of the pre-appeal report had only been cognisant of the offender's case for approximately three weeks. She also emphasises that the report is dated 26th January 2024, and is now a month old. She submits that, at most, it provides the court with a "snapshot" and that undue weight should not be given to that report. We bear in mind everything that Miss Fowler-Rouault has said, and have regard to all the circumstances of this case.

Our Assessment

41. In substance, we accept the principal submissions which have been made on behalf of the Solicitor General. In *Attorney General's Reference (No 132 of 2001) (R v Johnson)* [2002] EWCA Crim 1418; [2003] 1 Cr App R(S) 41 at [24], Potter LJ said:

> "… The purpose of the system of Attorney-General's References … seems to us to be the avoidance of gross error, the allaying of widespread concern at what may appear to be an unduly lenient sentence, and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type."

42. If anything, that has been reinforced by the developments in sentencing practice since 2002, in particular the creation of the Sentencing Council, the promulgation of definitive sentencing guidelines, and the provision of what is now section 59(1)(a) of the Sentencing Code.

43. In written submissions made on behalf of the offender, particular emphasis was placed on what was said by Lord Phillips CJ in *Attorney General's Reference (No 8 of 2007) (R v*

Danielle Krivec) [2007] EWCA Crim 922; [2008] 1 Cr App R(S) 1 at [16]. Although there is no reason to doubt that passage, we note that since 2007 Parliament has enacted what is now section 59 of the Sentencing Code (originally in section 125 of the Coroners and Justice Act 2009). Section 59(1) of the Sentencing Code now requires every court in sentencing an offender not merely to have regard to sentencing guidelines, but to follow the sentencing guidelines which are relevant to a defendant's case, unless the court is satisfied that it would be contrary to the interests of justice to do so. It is important that sentencing judges should comply with these requirements, not only because this is the will of Parliament, but also in the interests of consistency around the country.

44. On behalf of the offender, Miss Fowler-Rouault has sought to distinguish the recent decision of this court in *Hartland* (see in particular [63] to [68] in the judgment given by Stuart-Smith LJ) because of its very different facts. But it does not seem to us that it can be distinguished on the point of principle. It is wrong in principle for a sentencing court to circumvent the statutory limitation on the length of a custodial sentence that can be suspended by in effect converting it into a community order. But, in any event, a community order was simply not a suitable sentence in a case of this seriousness.

45. We have reached the clear conclusion that the sentence passed in this case was unduly lenient, even having regard to the mitigation that was available. The seriousness of the offending and the aggravating factors meant that it was simply not suitable for a community order. Indeed, no sentence other than an immediate sentence of imprisonment could properly be imposed in this case.

46. We have in mind the eloquent submissions that have been made by Miss Fowler-Rouault on behalf of the offender, in particular in relation to the progress that he has made, both in prison and in the community since. We have carefully considered whether we should

exercise out discretion not to quash the sentences imposed below, even though we have reached the view that they were unduly lenient, but we decline to exercise that discretion in the circumstances of this serious case.

47. Bearing in mind that the judge considered that the appropriate custodial term would have been three years' imprisonment, rather than the higher figure of six years that would have been imposed in another case, we consider that that is the minimum which needs to be imposed in this case.

Conclusion

48. In the result, we quash the community order that was imposed by the Crown Court and replace it with an immediate sentence of three years' imprisonment on each of the two drugs offences. There is a concurrent term of one year's imprisonment on count 13. The total sentence is one of three years' imprisonment.

49. There will be automatically deducted from the time to be served the number of days which the offender had spent in custody on remand in connection with the offences. On the information before us, we understand that to be 308 days.

50. We make an order requiring the offender to surrender to Islington Police Station by 4 pm today. We make it clear that the sentence takes effect from the date when the offender surrenders to custody.

51. We quash the victim surcharge order, which was imposed by the Crown Court. We do not impose any victim surcharge order for the time being.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk